FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 439.

JOHN MIHALCHAK,

Petitioner,

v.

AMERICAN DREDGING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

THOMAS E. BYRNE, JR.,
21 South 12th Street,
Philadelphia 7, Pa.,
Counsel for Respondent.

KRUSEN, EVANS AND SHAW,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	4
Point I. There Is No Important Question of Law in the Present Case Unless This Court Is Prepared to Re-Examine the Line of Cases Commencing With Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500	4
Point II. There Was Ample Evidence to Justify the Conclusion Which the Jury Reached	5
Point III. This Court's Decision in Crumady v. Joachim Hendrick Fisser, 358 U. S. 423 and the Other Cases Cited in Point II of the Petition Are Not Even Remotely Involved in the Present Case	9
CONCLUSION	10

CASES CITED.

	Page
Chesapeake and Ohio R. Co. v. Martin, 283 U. S. 209	7
Crumady v. Joachim Hendrick Fisser, 358 U. S. 423	9
Dietz v. The Greyhound Corporation, 234 F. 2d 327	6
Elzig v. Gudwangen, 91 F. 2d 434	6
Ferdinand v. Agricultural Insurance Company, 126 A. 2d 323	6
Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521	4
Gibson v. Thompson, 355 U. S. 18	4
Moore v. Terminal Railroad Association, 79 S. Ct. 2	4
Nicholas v. Davis, 204 F. 2d 200	6
Rogers v. Missouri Pacific R. Co., 352 U. S. 500	4, 5
San Francisco Association for the Blind v. Industrial Aid for the Blind, Inc., 152 F. 2d 532	6
Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620	7
Second National Bank of Pittsburg v. Hoffman, 229 Pa. 429	7
Slocum v. New York Life Insurance Company, 228 U. S. 364	7
Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401	7

MISCELLANEOUS.

	Page
92 A. L. R. 2d 1191 et seq.	6
Federal Employers' Liability Act, 45 USCA 51	4
F. R. C. P. 51	9
Jones Act, 46 USCA 688	1, 4

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 439.

JOHN MIHALCHAK,

Petitioner.

v.

AMERICAN DREDGING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

COUNTERSTATEMENT OF THE CASE.

The Petitioner, Mihalchak, brought this action under the *Jones Act*, 46 USCA 688, against his employer, American Dredging Company, alleging that an injury sustained by the Petitioner on May 22, 1956 was due to either negligence of the employer or unseaworthiness of the unmanned barge upon which he was injured.

Mihalchak was an experienced hand in this sort of work. He had held similar jobs for a period of about two years with other companies, plus about seven months that he had performed this same work for the Respondent (7b, 1b).[1]

1. In making reference to the record, we will use the suffix (a) to designate the Appendix for the Petitioner in the Court below and the letter (b) for the Appendix for the Respondent in the Court below.

On the evening of the accident which is here in question, Mihalchak had been on board a tugboat which was *not* owned or operated by the Respondent. The tug was utilized to provide motive power for barges or scows which were hauling mud from the place where the Respondent was conducting dredging operations to a dumping ground. The one-way trip was approximately 8 to 10 miles. While in transit, Petitioner rode the tug.

The scow in question (pictured 34a) had five separate pockets into which the dredged material was deposited. The unloading operation consisted of opening doors in the bottom of each of these pockets so that the dredged material simply sank to the bottom of the dumping area.

Anyone who has ever lifted a spade-full of mud is in a position to draw the inference that the weight of the contents in each of the five pockets of the scow was considerable.

The door on the bottom of each pocket was opened and closed by means of a chain. We accept the description of the mechanical arrangement as outlined in the Opinion of the Court below (page 18 of the Petition). What the Court below has referred to as a "dog" is nothing more nor less than a ratchet and pawl arrangement familiar to anyone who has ever tightened a tennis net. On this scow the pawl or "dog" was pivoted at its lower end so as to move in a horizontal plane as opposed to the vertical plane which is more customary on the ratchet and pawl used on a tennis net.

On the night that the cause of action in this case arose, when the flotilla arrived at the dumping site, Mihalchak left the tug and went on board the loaded scow. He was the only person on the scow and, in this connection, it is worthwhile to note that the crew of the tug were not employees of this Respondent. When he went on board the scow Mihalchak had in his hand the heavy maul or sledge which it was intended should be used to strike the pawl so as to dislodge it from the teeth of the ratchet and thereby

permit the tremendous weight of the wet mud to force open the doors composing the bottom of the pocket of the scow and thus empty it.

Once aboard the scow, Mihalchak used his sledge in the usual and expected way to strike the pawl and open the first pocket. He moved to the second one. He testified that he had his hand in the space on one side of the pawl, removing mud and debris when the pawl *spontaneously* moved sidewise out of the teeth of the ratchet thus permitting the door to open.

While it is true that the Respondent placed no witness upon the stand who testified as to the manner in which the accident happened, that is not quite a full and complete account. The Respondent argued to the jury that the uncontroverted facts as established by the testimony introduced by the Petitioner, plus the plain and clear inferences to be drawn from photographs introduced into evidence by the Petitioner, which photographs were taken on two distinct occasions, logically compelled the jury to conclude that the Petitioner's injury was due neither to negligence of the Respondent nor unseaworthiness of its scow. Rather, the argument made to the jury was that Mihalchak brought about his own injury by striking the pawl at a time while his other hand was in the space into which the blows he was delivering were intended to drive the pawl and that, consequently, he had caused his own injury. That was the argument which the jury must necessarily have accepted because it returned a verdict in favor of the Respondent.

There is no question presented here concerning the propriety of the Charge of the Trial Judge to the jury. No exception was taken to that Charge and the issue submitted, particularly the contention of the defense, is clearly set forth in the first full paragraph on page 40b of the Appendix of the Respondent in the Court below.

ARGUMENT.

Point I.

There Is No Important Question of Law in the Present Case Unless This Court Is Prepared to Re-Examine the Line of Cases Commencing With Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500.

During the 1956, 1957 and 1958 Terms of this Court a host of cases were decided, based upon the philosophy expressed in this Court's decisions in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 and the other cases in the group decided February 25, 1957. Since that date this Court, on several occasions, has reinstated the verdicts of juries which had found in favor of a plaintiff under the F. E. L. A., and or the Jones Act, stating:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Moore v. Terminal Railroad Association, 79 S. Ct. 2; *Gibson v. Thompson*, 355 U. S. 18.

In both of these decisions the Rogers line of decisions has been cited in support of the action taken by the Court. We assume that in so holding the Court was not promulgating a unilateral rule and that, where the jury concluded that employer negligence (or unseaworthiness) did *not* play a part in producing the Petitioner's injury, this Court will not tolerate judicial intervention with that jury finding. If, in fact, Congress in passing the *Federal Employers' Liability Act*, 45 USCA 51, and the *Jones Act*, 46 USCA 688, intended to require abdication of the judicial function where the jury had found a verdict in favor of the plaintiff, it seems to follow logically that the abdication which the Acts of Congress required was not intended to be

unilateral so as to apply only where the jury's verdict had been returned in favor of the original plaintiff, but that logic requires the same end result where the verdict of the jury has been a finding of the *absence* of negligence (and unseaworthiness) on the part of the employer.

As we see the present case, it is a fit subject for the grant of certiorari by this Court only under two possible conditions. One is if this Court is prepared to rewrite the rule it laid down in *Rogers v. Missouri Pacific, supra*, to provide that the proofs justify with reason the jury's conclusion only where there is a finding in favor of the plaintiff, or if this Court is prepared to re-examine the *Rogers* case and those which have followed it. In the latter event we would join in the Petitioner's prayer that the Writ be granted.

Point II.

There Was Ample Evidence to Justify the Conclusion Which the Jury Reached.

The Petitioner does not attack the holding of the Court of Appeals that in this Jones Act suit the Petitioner has the burden of production and of persuasion. The Petitioner affirmatively argues for what would necessarily be a revision of the rule of *Rogers*. He makes this attack on the holdings of both Courts below, in spite of the following facts:

1. The credibility of the Petitioner was attacked upon a number of Points. Some went directly to the core of the question of liability (21a, 4b, 5b, 19b, 20b, 31b, 32b) and the veracity of Petitioner and his witness. Other questions were raised as to the veracity of Petitioner's testimony upon the question of disability, its duration and degree (12b, 13b, 14b, 15b, 16b, 26b, 27b, 29b, 30b). No direct testimony other than the Petitioner's was possible because no one else was on

the scow and there was no witness to the accident except Petitioner.

2. The Petitioner was an interested witness.

3. The Petitioner had the burden of proof.

4. The Petitioner's version of how the accident occurred was inherently incredible and contrary to physical laws and common experience.

5. Evidence in the form of photographs which the Petitioner himself introduced clearly demonstrated the converse of the Petitioner's assertion that the equipment in question was unfit for the purpose for which it was intended (unseaworthy).

We start with the fundamental proposition that the question of whether a witness is to be believed or not is ordinarily one of fact for decision by the jury. The general rule is that a jury question as to credibility is presented by oral testimony which, although not directly contradictory, contains inherent probability or there has been reflection upon the veracity of the witness at other points in his testimony. *Elzig v. Gudeangen*, 91 F. 2d 434, and cases there cited; see cases collected 62 A. L. R. 2d 1191 et seq.

Since that was true in the case at bar compare 6b, 7b with 12b, 14b, 15b, 16b, 17b. There was an issue for the jury to resolve as to the credibility of this Petitioner. The cases upon which the Petitioner relies such as *San Francisco Association for the Blind v. Industrial Aid for the Blind, Inc.*, 152 F. 2d 532, and *Dietz v. The Greyhound Corporation*, 234 F. 2d 327; *Nicholas v. Davis*, 204 F. 2d 200, are neither controlling nor persuasive. The inferences which a jury may draw are outlined at length by the late Chief Justice Vanderbilt speaking for the Supreme Court of New Jersey in *Ferdinand v. Agricultural Insurance Company*, 126 A. 2d 323. So long as different inferences may reasonably be drawn the verdict of the jury may not be set aside.

The Petitioner here was an interested witness. The reliance which he places upon this Court's decision in *Chesapeake and Ohio R. Co. v. Martin*, 283 U. S. 209, is mistaken. The witness whose testimony was under discussion in the *Martin* case did not have such an interest in the outcome of the litigation as would make applicable the rule stated by this Court in *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401 and *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620. In the *Sonnentheil* case this Court said that the mere fact of interest on the part of the witness in the outcome of the proceeding is sufficient to require determination by the jury. In the *Sartor* case judgment had been granted in the Court below in a summary judgment proceeding based upon affidavits, but this Court reversed, saying:

> "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury on a question of fact". 321 U. S. 620 at 628.

This is the usual rule applicable in most, if not all, Courts. It is the Pennsylvania rule. In *Second National Bank of Pittsburg v. Hoffman*, 229 Pa. 429, the Supreme Court of Pennsylvania said:

> "If he was interested, his credibility under none of our cases could have been taken from the jury".

What has been said is made doubly apt by the fact that in the case at bar the person whose testimony is being discussed was the party upon whom the law imposed the burden of proof. *Slocum v. New York Life Insurance Company*, 228 U. S. 364. The rule of the *Slocum* decision has been reiterated in a host of later cases.

As part of his case, the Petitioner introduced two separate sets of photographs. The first set was taken without the knowledge of the Respondent only a few weeks following

the injury. The second set was taken shortly prior to trial and long after suit had been instituted. The Petitioner and his witness said that the ratchet and pawl arrangement shown upon both sets of pictures was the same ratchet and pawl which had been involved in the accident. The pictures were their own demonstration of the fact that the equipment had not been changed, altered or repaired in the interim. On both occasions the testimony showed the mechanism was performing its intended function, the pawl prevented the ratchet from turning and it in turn was holding the chain which supported the bottom of the scow. It was surely reasonable for the jury to draw the inference that steel chain does not stretch. If that be so, then the pawl was inserted in the portion of the ratchet shown in the photographs. Those photographs showed that one edge of the pawl was flared from repeated blows of the sledge, in a manner somewhat similar to the way the head of a steel chisel becomes flared with use. It is obvious that no amount of flaring of the head of a chisel prevents the *other end* from performing its intended function. So in our case, the end of the pawl intended to hold the ratchet was performing its intended function in the photographs the Petitioner himself introduced into evidence. It was just as obvious that the equipment was neither new nor recently repaired. The Petitioner nevertheless now argues that the jury was not free to conclude that the most likely explanation for the accident was that the Petitioner himself had caused it, and that he had been less than completely candid in his testimony in which he denied that he struck the pawl with his sledge just prior to the accident. The demonstration which the photographs gave of proper and successful operation all during the intervening time, from the date of the accident to the date the second set of photographs was taken, was indicative of the fitness of the equipment for its purpose and the jury was certainly entitled to reach *its own conclusions* based upon this record.

What the Petitioner really asks this Court to hold is that a Trial Court must nevertheless direct the verdict in favor of the party upon whom rests the burden of proof and the burden of persuasion simply because there may be oral testimony as to the existence of something which, on the basis of physical facts demonstrated in the record, is either impossible or inherently improbable.

The Petitioner makes an argument which, in the setting of this case, is hardly pertinent. This statement is directed to that portion of the Petitioner's argument (Petition p. 10) wherein it is stated that the equipment involved was in the possession of the Respondent. From this it is argued that the election of the Respondent to dispense with oral testimony, concerning points already photographically demonstrated by exhibits introduced by the Petitioner, called for the direction of a verdict for Petitioner. The Petitioner was entitled to ask the Trial Judge to instruct the jury on this point if he had then deemed it appropriate. No such instruction was requested and no complaint is here made concerning the Charge of the Trial Judge to the jury. Since no instruction on the point was requested, the Petitioner is not now entitled to complain. F. R. C. P. 51.

Point III.

This Court's Decision in Crumady v. Joachim Hendrick Fisser, 358 U. S. 423 and the Other Cases Cited in Point II of the Petition Are Not Even Remotely Involved in the Present Case.

In the Petitioner's Point II, he seizes upon language taken out of context from the decision of the Court below and attempts to premise an argument which is patently incorrect.

The Court of Appeals was discussing testimony (Petition p. 20) "of instances on some of the other scows operated by the same company where similarly chipped teeth and dogs had actually slipped". The Opinion of the Court

below then went on to point out that the testimony in this case, pertaining *to those other instances*, did not foreclose the possibility that *in those other instances* of slipping of the pawl *on other scows* there was the possibility that such slipping "was occasioned by original improper securing of the dog". That, we suggest, is a far cry from arguing that the Court of Appeals founded its decision, affirming the District Court, upon the proposition that the dog or pawl in this case slipped from the gear because it had been improperly secured originally.

The Petitioner's argument lacks logic on other grounds if it is applied to the facts of this case. Here the pawl or dog had been inserted well enough to support the tremendous weight of the contents of the pocket all during the time the mud was being deposited in it, plus the time that it took to transport the scow 8 or 10 miles from the dredging site to the dumping site where the accident occurred. We concede improper insertion might be a permissible inference for the finder of facts to draw from the evidence, but surely it was not a compulsory inference such as to make the conclusion one of law for the Court rather than for jury determination.

CONCLUSION.

No important point of law is involved in this case. The Petitioner neither cites nor claims conflict between Circuits and the decision of the Court below is clearly consonant with the rules of decision of this Court. There is nothing in the case which merits the grant of certiorari.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Respondent.